BRB No. 04-0795

JOHN COLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	
	)	
and	)	
	)	
U.S. FIRE INSURANCE COMPANY	)	DATE ISSUED: 06/28/2005
	)	
and	)	
	)	
GREENWICH TERMINALS	)	
	)	
and	)	
	)	
AMERICAN MOTORISTS, INCORPORATED COMPANY	)	
	)	
Employers/Carriers-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman & Lorry, P.C.), Cherry Hill, New Jersey, for claimant.

John E. Kawczynski (Field, Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for Holt Cargo and U.S. Fire Insurance.

Eugene Mattioni and Francis X. Kelly (Mattioni, Ltd.), Philadelphia, Pennsylvania, for Greenwich Terminals and American Motorists.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-1314, 2003-LHC-1315) of Administrative Law Judge Janice K. Bullard rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a cargo checker for many years. Beginning in 1988, he developed problems related to degenerative disc disease in his spine. In February and April 2001, while working for Holt Cargo Systems (Holt Cargo), claimant experienced pain in his neck and back. By October 2001, he had returned to his usual work on a full-time basis. Claimant filed a claim, and Administrative Law Judge Romano awarded claimant temporary total disability benefits from April 5, 2001, until October 26, 2001, finding that claimant aggravated his pre-existing back condition and that Holt Cargo failed to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. Holt Ex. 22. In May 2002, claimant began working for Greenwich Terminals (employer), at the former Holt Cargo facility, using the same equipment and performing the same duties. Tr. at 33. On September 11, 2002, claimant was performing his regular duties driving a pickup truck in the terminal. He testified that, after driving over railroad tracks a number of times, he experienced sharp pains in the left side of his chest and soreness in his back and neck. Tr. at 45. He reported the symptoms and was taken to the hospital. After confirming he had not had a heart attack, he sought treatment for his back and neck pain. He treated with Dr. Lefkoe who diagnosed acute cervical, thoracic and lumbosacral strain/sprain aggravating pre-existing degenerative disc disease, spondylosis, and multiple herniations. Cl. Ex. 1 at 16-17. Claimant filed a claim for temporary total disability benefits, and as of the date of the hearing, September 16, 2003, had not returned to work.

The administrative law judge found that claimant established a *prima facie* case that his work for employer aggravated his pre-existing condition, by demonstrating a harm, his degenerative spinal condition, and conditions at work that could have caused the harm, roadways that were not completely smooth. Decision and Order at 13. She then found that employer presented the unequivocal opinions of two doctors, Drs. Mandel and Cohen, that claimant's condition was not related to his work but, rather, was related to the inevitable natural deterioration of his degenerative condition, and she concluded that employer rebutted the Section 20(a) presumption. Decision and Order at 14. After weighing the evidence, the administrative law judge credited the opinions of the doctors who opined that claimant's underlying spinal disease was the sole cause of claimant's increased symptoms and that those symptoms were not triggered by anything claimant did at work. Decision and Order at 16-18. The administrative law judge found there was no aggravation for which employer was liable, and she found that the increase in

symptoms was not the natural progression of anything that occurred in 2001 while claimant was employed by Holt Cargo. Accordingly, she denied benefits. Decision and Order at 19.

Claimant appeals the denial of benefits, contending the administrative law judge misapplied the law and erred in finding that employer rebutted the Section 20(a) presumption. Employer responds, arguing that there was no compensable injury on September 11, 2002, and the administrative law judge's decision is supported by substantial evidence. Alternatively, it argues that any injury to claimant was the natural progression of the injury he sustained in 2001 while employed by Holt Cargo. Holt Cargo also responds to the appeal. It asserts that the administrative law judge failed to apply the appropriate law, thereby requiring reversal of her decision and a holding that employer is liable for an aggravation of claimant's underlying condition.

In determining whether an injury is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after he establishes a *prima facie* case. To establish a *prima facie* case, the claimant must show that he sustained a harm or pain and that conditions existed or an accident occurred at his place of employment which could have caused the harm or pain. *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981); *see also U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the injury to the employment, and the employer can rebut this presumption by producing substantial evidence that the injury was not related to the employment. *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999); *see also American Grain Trimmers v. Director, OWCP*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Where aggravation of a pre-existing condition is at issue, the employer must establish that the work events neither directly caused the injury nor aggravated the pre-existing condition, resulting in the injury. *Conoco*, 194 F.3d 684, 33 BRBS 187(CRT). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999); *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*); *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

It is undisputed that claimant had a serious back condition prior to either the events of early 2001 or those of September 2002. In addition, Judge Romano found that

the work events of early 2001 caused a temporary exacerbation of claimant's symptoms related to his pre-existing spinal condition. Claimant recovered sufficiently to permit him to return to his usual full-time work in October 2001. For a period of 10 or 11 months, claimant was able to continue this work. On September 11, 2002, allegedly due to driving over railroad tracks at work numerous times, claimant had an onset of pain. Based on these undisputed facts, the administrative law judge properly invoked the Section 20(a) presumption relating claimant's back condition to his work. Next, the administrative law judge credited the opinions of doctors who stated that claimant's back condition is not related to the work activity but is related to his pre-existing degenerative condition. She credited the opinions of Drs. Cohen and Mandel, finding that they opined that claimant's symptoms were related solely to his degenerative back condition, that any activity could have caused claimant to have pain, and that nothing he did on September 11, 2002, caused his condition. *Id.*; Emp. Exs. 1-2. In light of this evidence, the administrative law judge found the presumption rebutted and, on the record as a whole, that claimant's disability following his work on September 11, 2002, was not related to that work because his symptoms mimicked those he had previously and because there was no evidence that anything traumatic or unusual occurred that day. Decision and Order at 15-19. We cannot affirm the decision denying benefits, because the administrative law judge did not consider the evidence in light of the applicable law.

Initially, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, and that court has addressed the aggravation issue in the context of determining the responsible employer in *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002). In *Delaware River Stevedores*, the claimant injured his back and was out of work for a short period of time. He then returned to his usual work for over two years until he developed disabling back symptoms. The Third Circuit noted with approval the Board's recitation of the law regarding the aggravation rule; the court further stated if the conditions of an employee's employment caused the claimant to become symptomatic, even absent permanent results, there has been an injury within the meaning of the Act and the employer at the time of the work events leading to the exacerbation, even if it is only temporary, is liable for benefits. *See Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT). As the medical evidence in that case supported a finding that the claimant suffered a "flare-up" of symptoms from his underlying condition while working for the subsequent employer Delaware River Stevedores, Delaware River Stevedores was liable for his temporary total disability benefits. *Id.*, 279 F.3d at 243-244, 35 BRBS at 162(CRT).

In case at bar, the administrative law judge did not cite or address the Third Circuit's decision. Further, while the credited physicians conclude that claimant's underlying *condition* is related to his severely degenerative disc disease and not his employment, both doctors acknowledged that claimant had an onset or "flare-up" of *symptoms and pain* on September 11, 2002. Emp. Ex. 1 at 26-27; Emp. Ex. 2 at 19, 85.

They both stated that driving over railroad tracks and holes or bumps could produce pain symptoms. Emp. Ex. 1 at 26-27; Emp. Ex. 2 at 62; *but see* Emp. Ex. 2 at 85, exh. 1.[1] It is clear that the onset of symptoms constitutes an injury within the meaning of the Act. *Gardner v. Director, OWCP*, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981);[2] *Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). That the symptoms could have developed anywhere does not negate the fact that claimant's symptoms, here, developed while he was working for employer on September 11, 2002; if the work played any role in the manifestation of a symptom, any disability due to the symptoms is compensable. *Obert v. John T. Clark & Son of Maryland*, 23 BRBS 157 (1990); *Cairns v. Matson Terminals, Inc.*, 21 BRBS 252 (1988). Moreover, the occurrence of an "unusual" event is unnecessary if the conditions of employment caused the claimant to become symptomatic. *Delaware River Stevedores*, 279 F.3d at 241, 35 BRBS at 160(CRT); *Vessel Repair*, 168 F.3d 190, 33 BRBS 65(CRT);[3] *Wheatley*, 407 F.2d 307; *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984), *aff'd sub nom. Bell Helicopter Int'l, Inc. v. Jacobs*, 746 F.2d 1342, 17 BRBS 13(CRT) (8th Cir. 1984).

Accordingly, we hold that the administrative law judge erred in failing to apply the evidence to the applicable law and in requiring that an "unusual" event had to occur for claimant's condition to be work-related. For these reasons, we vacate the denial of benefits, and we remand the case to the administrative law judge for reconsideration. *See generally Bath Iron Works Corp. v. Preston*, 380 F.2d 597, 38 BRBS 60(CRT) (1st Cir. 2004). On remand, the administrative law judge must determine whether employer produced substantial evidence to rebut the Section 20(a) presumption that claimant's work aggravated his underlying condition or caused it to become to symptomatic. *See Burley v. Tidewater Temps, Inc.*, 35 BRBS 185 (2002). If the presumption is rebutted,

---

[1]Dr. Cohen later stated that claimant's symptoms were not related to the driving because claimant could have been anywhere, doing nothing, and the symptoms would have emerged. Cite to record. *But see* cases cited, *infra.*

[2]The United States Court of Appeals for the First Circuit stated in *Gardner*, 640 F.2d at 1389, 13 BRBS at 106:

> Whether circumstances of [claimant's] employment combined with his disease so to induce an attack of symptoms severe enough to incapacitate him or whether they actually altered the underlying disease process is not significant. In either event his disability would result from the aggravation of his preexisting condition.

[3]The work event need not be the *sole* cause of a disability; it need only be *a* cause. *Vessel Repair*, 168 F.3d at 193, 33 BRBS at 67(CRT).

she must consider the relevant evidence of record as a whole in light of applicable law. If the administrative law judge finds that claimant sustained a work-related aggravation of his condition on September 11, 2002, she should address the issue of the nature and extent of claimant's disability due to the work aggravation, as well as any other remaining issues.[4]

Accordingly, the administrative law judge's denial of benefits is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4]In light of her findings on remand, the administrative law judge also should reconsider any contentions of the two employers regarding which is the responsible employer. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002); *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).